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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 287

AL POLIZZI,
Petitioner,

v.

COWLES MAGAZINES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

Opinions Below

No formal opinion was filed in the District Court, but the ground for dismissing the action is stated in the order of the District Court as follows (R. 106-107*):

> "* * * the Court * * * finds as a matter of fact that defendant was not, at the time of the service of the summons, doing business in this district and that, therefore, this Court does not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code."

The opinions in the Court of Appeals for the Fifth Circuit (R. 109-115) are reported at 197 F. 2d 74.

*References are to pages of Transcript of Record.

Jurisdiction

The decision of the Court of Appeals was rendered on May 23, 1952 (R. 109-115). The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit was filed on August 20, 1952, and granted on October 20, 1952. The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1).

Proceedings in Courts Below

Petitioner, a resident of Florida (R. 4), brought this action in the Circuit Court for Dade County, Florida against respondent, an Iowa publishing corporation (R. 4, 71-72), for libel based upon an article which appeared in the May 23, 1950, issue of respondent's magazine, Look (R. 4-14). Copies of the summons and complaint were served upon Raymond J. Jennings, both (1) as agent of the respondent herein and (2) as agent of The American News Company, Inc., as agent of respondent (R. 14-15). Respondent first moved in the Florida state court to dismiss the action or, alternatively, to quash the returns of service* (R. 15-16).

The action, which on its merits involves no federal question, was then removed to the United States District Court for the Southern District of Florida, Miami Division, solely because of diversity in citizenship of the parties. Petitioner procured the issuance by the District Court of an additional summons and the service thereof upon Paul T. Briardy as "managing agent" of respondent (R. 40-42). Respondent thereupon moved to dismiss the action or to

*On petitioner's own motion, later made in the District Court, these returns of service were quashed (R. 14-15).

quash the return of service on Briardy, as "agent" of the foreign corporation, upon the following grounds (R. 105-106):

> 1. That the corporation was not subject to service of process within the State of Florida, inasmuch as it was organized under the laws of Iowa, was not transacting business in Florida, and had not appointed an agent for service of process in Florida; and
>
> 2. That Briardy was not an officer, a managing or general agent, or an agent authorized by appointment or by law to receive service of process for the corporation.

The motion to dismiss having been granted in the District Court, judgment was entered thereon (R. 106-107). On appeal, the Court of Appeals for the Fifth Circuit affirmed (R. 109-115), Judge Russell dissenting (R. 114-115). A petition for certiorari was granted by this Court on October 20, 1952.

Statutes Involved

When the cause was removed to the United States District Court, an additional summons was issued by that Court to Paul T. Briardy. The pertinent section of the Federal Rules of Civil Procedure (28 U. S. C., Rule 4(d)(7)) provides that:

> "* * * it is also sufficient if the summons and complaint are served * * * in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon

any such defendant in an action brought in the courts of general jurisdiction of that state."

Section 47.17, Florida Statutes Annotated, provides that process against any corporation, domestic or foreign, may be served upon certain designated officers and agents or a director of the corporation. It further provides:

"If a foreign corporation shall have none of the foregoing officers or agents in this state, service may be made upon any agent transacting business for it in this state."

Counter Statement of Questions Presented

1. Does the decision of this Court in *International Shoe Company* v. *Washington*, 326 U. S. 310, have the effect in diversity jurisdiction cases of over-riding the test of "doing business" recognized by the local law of the forum and of substituting therefor some new, all-controlling federal test of "doing business"?

2. Where there is no basis under the statutory or case law of the state of the forum for subjecting a foreign corporation to *in personam* jurisdiction upon the undisputed facts present in a given case, must the federal court in a diversity jurisdiction case, nevertheless assert *in personam* jurisdiction over such foreign corporation simply because the state of the forum might have, consistent with federal constitutional requirements, provided for, and asserted, such jurisdiction had it chosen to do so?

3. Is the holding of the Court of Appeals declining *in personam* jurisdicton over this respondent foreign cor-

poration, to adjudicate a transitory action not arising in the state of the forum, where respondent has no continuous corporate activity in that state through any office, property, agent or employee regularly located there, so clearly erroneous as to require a reversal by this Court?

Restatement of the Facts.

All facts relevant to the determination of the issues of jurisdiction and validity of service of process are sufficiently developed in depositions taken by petitioner of (1) M. C. Whatmore, vice president, business manager and one of the directors of respondent; (2) Paul T. Briardy, an employee of the respondent, whose travels into Florida are relied upon by petitioner as amounting to the transaction of business by respondent there; and (3) Raymond J. Jennings, Miami, Florida, Branch Manager of The American News Company. The Court of Appeals held that the facts were "undisputed" but "more fully elaborated" (R. 110) in respondent's brief to that Court. We restate below these undisputed facts in full.

A. Respondent's Business

The respondent is an Iowa corporation with its principal offices in Des Moines, Iowa and New York City, New York (R. 71-73). It is the publisher of LOOK Magazine, a bi-weekly periodical distributed throughout the United States (R. 17, 19, 90) and two other magazines, QUICK and FLAIR.

The respondent has never qualified to do business in the State of Florida and has never conducted any business

in that State (R. 18, 97). It has never had any office, telephone or other directory listing, bank account, securities, real estate, or personal property (tangible or intangible) in Florida (R. 18, 64, 72, 97). It has never had a safe deposit box nor any books or records in Florida (R. 64-65, 97). None of its officers or directors work in Florida, nor do any of its employees, except Paul T. Briardy (upon whom the purported service was made) and one other circulation roadman who occasionally visits Pensacola (R. 32, 64, 68, 94, 97). These two minor employees come into Florida only from time to time and for the very narrow and limited purposes described later in this brief (*infra* pp. 11-13). Respondent has no salesmen or other employees soliciting advertising in, or sales of, its magazines in Florida (R. 93-95).

The sole business of the respondent is the publication of magazines. This involves basically three operations: first, the physical production of the magazines; second, their distribution and sale; and third, the sale of advertising space in the magazines. For these purposes, the respondent maintains, in addition to its main corporate office, certain branch offices charged with the preparation of editorial matter, the handling of the distribution of the magazines, and the solicitation of advertising. None of the respondent's offices, however, is in the State of Florida (R. 18, 64, 72).

B. Its Offices

Respondent maintains its principal corporate office in Des Moines, Iowa, where the annual meetings of its stockholders and directors are held and where its subscription department is located (R. 71-72, 98). The principal busi-

ness, editorial and advertising offices are maintained in New York City; editorial offices are likewise maintained in Los Angeles and Chicago, and offices for the solicitation of advertising are located in Boston, Cleveland, Detroit, Philadelphia, Los Angeles, San Francisco and Chicago (R. 72).

C. Its Product, LOOK Magazine

Since the cause of action, if any, set forth in petitioner's complaint has to do solely with Look Magazine and the depositions taken by petitioner were accordingly limited almost entirely to that magazine, respondent will not burden this Court in this brief with any discussion concerning respondent's other two publications. If such matter were relevant, the facts contained in the affidavits and depositions in the record show that no activities whatever having to do with the preparation, production or sale of, or the solicitation of advertising in, any of the respondent's three magazines, including its principal product Look, occurred in Florida.

1. Preparation and manufacture of LOOK

The material for each issue of Look Magazine is selected, edited and put in final form for printing in New York City; the magazine is printed and bound by an independent company in Chicago, Illinois (R. 95-96). No step in the writing or production of the magazine takes place in Florida (R. 18, 72, 95-96), although, of course, from time to time photographers and writers have been sent to Florida on specific story assignments, just as they have been sent elsewhere in the United States on like errands (R. 91-92).

2. Sale of LOOK

LOOK Magazine is purchased by the public in two ways: first, from newsstands and other retail outlets; second, by subscriptions for a given term—usually a year.

(a) *Subscriptions* are sold in three ways. First, they are sold by the respondent from its Des Moines office through direct mail solicitation (R. 85). Second, they are sold by independent companies or individuals—loosely referred to as "subscription agents"—although they are in no sense agents or employees of the respondent (R. 92-94). These companies send soliciting crews into various states, taking orders for a large number of different magazines (R. 28, 93). The individuals are "independent contractors" who solicit subscriptions on their own (R. 93). Third, subscriptions are sold by retail outlets, *i.e.*, independent retailers such as newsstands, book stores and the like, which transmit them to respondent directly or through their wholesaler (R. 27-28). All subscriptions are subject to rejection by the respondent at, and are serviced from, its Des Moines, Iowa, office (R. 93-94, 98). All subscription copies are mailed from the bindery in Chicago, Illinois (R. 98).

(b) *Single copy sales* are handled by many thousands of retail outlets which purchase their copies from wholesalers. The respondent sells copies of LOOK to about 300 wholesalers throughout the country (R. 77-78, 86-87), the largest of which is The American News Company, with branches throughout the United States which handle a total of approximately 400 magazines (R. 29, 87). The relationship between respondent and

the wholesalers is that of "vendor and vendee" (R. 27, 30, 75-76). The respondent receives from each wholesaler an order blank or sheet for each issue of the magazine. In the case of The American News Company, the order blank is submitted by that company's home office in New York City for all its branches wherever located (R. 95); a copy of the order blank for the issue of Look Magazine involved in this action appears in the record (R. 102A-104). The respondent's traffic department in New York then prepares order slips from the order sheets and sends these to the American Colortype Corporation at Chicago, Illinois, which does the entire binding and shipping operation of Look, under contract, and has no corporate relationship with respondent by stock ownership, interlocking directorates, officers or otherwise (R. 95-96). The bindery fills each individual order from the order slips and when the bundles are ready for shipment, they are loaded on trucks, freight cars and other common carriers for shipment to their destinations (R. 95-96). In the case of The American News Company, the bundles are addressed to the individual branches; in the case of the other wholesalers, they are addressed to the particular wholesaler (R. 96). Once magazines are bundled and delivered by the bindery to the common carrier for shipment, the respondent has no physical control whatever over their distribution (R. 97). The respondent bills the wholesalers for the copies shipped, and in the case of The American News Company where the shipments are made to the branch offices, the News Company's main office in New York City receives a lump-sum bill (R. 98). The respondent has no transactions whatever with the individual

branches of the News Company, a wholly independent corporation with no connection or affiliation whatsoever with the respondent (R. 17-20, 97-98). Respondent has no power to direct the operation of any wholesaler with respect to the sale of LOOK Magazine, and has nothing to do with the magazine's distribution or sale, except as stated above (R. 98, 100). Moreover, the respondent deals only with the wholesaler—it does not even have a record of the names and places of business of the retail outlets which sell its magazines (R. 82, 99).

The only wholesalers who purchase magazines from respondent for resale in Florida are The American News Company and Cooper News Company; its relationship and method of operation with both are similar, and it may terminate its business dealings with them at any time (R. 88, 100).

Thus, no part of the respondent's production, distribution or sale of LOOK Magazine takes place in Florida (R. 98).

3. Sale of advertising in LOOK

Respondent solicits advertising from independent advertising agencies representing the advertiser-companies; it does not solicit advertising from the advertiser-companies (R. 83-84). It employs a large staff of advertising salesmen, whose job it is to call on these agencies to "sell" them on placing advertising in the respondent's publications (R. 84). Advertising involving Florida companies is solicited from, and purchased by, their advertising agencies in New York and Chicago (R. 83). To carry on this solicitation, the respondent maintains its advertising offices, to

which we have already referred—but it neither maintains an advertising office in Florida nor employs any salesmen to solicit advertising in that State (R. 72, 94-95).

D. Respondent's Sole Contact with Florida

Respondent does not solicit the sale of anything in Florida nor does it sell anything there (R. 63-64, 92-95). It has no office, place of business, or permanent location nor even telephone, office, or building listing there (R. 18, 64, 97). No representative of the respondent is maintained in Florida for any purpose whatsoever (R. 32, 43, 64). Its only contacts are by two travelling circulation roadmen who on occasion come into parts of Florida as included within their broader territories (R. 68-69, 80).

The respondent's only employees having any contact with Florida are these two "circulation roadmen" (R. 62, 68-69, 80). Neither of them reside in, or is or has been regularly stationed or located in, that State; their sole duties are to check the display and position of respondent's magazines at the retail outlets, to note any complaints of retailers and to report them to respondent's New York City office, and occasionally to put up a few advertising posters (R. 31-32, 43-44, 46, 51-52, 80). *They do not solicit subscriptions or advertising* (R. 52, 59, 65).

Paul T. Briardy (to whom the summons and complaint in this action was delivered by the marshal) includes in his territory all of Florida, with the exception of Pensacola which is on the route of the other circulation roadman. Briardy as a circulation roadman covers Alabama, Georgia, Mississippi and South Carolina along with Florida (R. 62, 68-69, 80, 82), and his authority and activities are strictly limited to the simple duties of checking or surveying retail

outlets in this five-state territory. As he phrased it (R. 43): "I travel out of my suitcase, from town to town. I have no place except a letter drop in Miami, and all other mail in hotels." He has nothing to do with the physical handling or distribution of respondent's magazines (R. 63, 80). He has no authority to employ anyone for respondent, to buy or sell anything for it, or to make any contracts or commitments for it (R. 62-63, 81-82). He has nothing to do with selecting the wholesalers, no authority to cut off any wholesaler or to cancel any of its shipments if the wholesaler fails to comply with his suggestions (R. 33-34, 62-64, 66). The limit of his authority is to report to respondent's office in New York. He has no desk or office space either in Florida or elsewhere, nor any listing under respondent's name in any telephone or other directory (R. 53, 64); the mail which he receives from the respondent is forwarded to him in accordance with an itinerary which he furnishes respondent (R. 65, 90). He prepares his reports in his hotel room (R. 53). He is not an officer or director of respondent; he has never received any instructions from respondent as to what he should do if any attempt were made to serve legal process on him for the respondent (R. 65-66).

Briardy receives a salary of $75 per week plus $30 per week to reimburse him for the gas, oil and upkeep of the automobile in which he travels (R. 49-50). This automobile belongs to Briardy; he purchased it, carries his own insurance, pays for the gas, oil, repairs, new tires, etc., and uses it for his own personal pleasure as well as for company business (R. 49-50). He receives no commission or other additional compensation (R. 63, 90).

As Briardy divides his time approximately equally among the five states through which he travels, the time

which he spends in Florida is comparatively insubstantial (R. 62, 68-69).

Summary of Argument

1. A federal court in a diversity jurisdiction case in determining the issue of "doing business" is in exactly the same position as the state court of the forum and is bound to apply the local law of the forum.

2. Neither the federal due process clause, nor this Court's clarification in *International Shoe Company* v. *Washington, supra,* of the permissive limits of due process, requires a federal court in a diversity jurisdiction case to assert *in personam* jurisdiction over a foreign corporation in the circumstances here presented.

3. No error was committed by the District Court or the Court of Appeals in refusing to assert *in personam* jurisdiction over respondent in the instant case. Under the local law of the forum there is no basis either in the Florida statutes or the decisions of the highest court of Florida for asserting such jurisdiction over the respondent.

4. The holding of the courts below is not in conflict either with the decisions of this Court or the decisions of other Courts of Appeal in the First, Second, and Seventh Circuits.

ARGUMENT

I

THE TEST OF "DOING BUSINESS" IN A DIVERSITY JURISDICTION CASE IS DETERMINED BY THE LOCAL LAW OF THE FORUM.

Jurisdiction of the federal court in the instant case is invoked solely on the basis of diversity of citizenship of the parties. The question as to whether this foreign corporation respondent may be forced to litigate in the courts in Florida must, therefore, under the rule established by this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, be determined by the law of the forum, *i.e.*, Florida. As this Court pointed out in *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99 at p. 109, in explaining the effect of the *Erie* v. *Tompkins* decision:

> "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same * * * as it would be if tried in a State court."

In *Woods* v. *Interstate Realty Co.*, 337 U. S. 535 at p. 538, this Court said that "for purposes of diversity jurisdiction a federal court is, in effect, only another court of the state."

A situation directly in point was presented in *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (1948). There, the Court of Appeals for the First Circuit, in holding that the test of doing business was to be determined by the law of the forum, said (p. 194):

> "This case is brought solely on diversity grounds in a federal court sitting in Massachusetts. Rule 4(d)(7) of the Federal Rules of Civil Procedure, 28 U. S. C. A., provides that service of process on a foreign corporation is valid if made in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made. There being no federal statute applicable, and service having been attempted under Massachusetts procedure, the case is governed by the requirements for valid service in that state."

A recent application of this doctrine by the Court of Appeals for the Seventh Circuit is found in *Canvas Fabricators* v. *William E. Hooper & Sons Co.*, 199 F. 2d 485 (1952), where that Court said (p. 486):

> "The primary contested issue is whether defendant was 'doing business' in the State of Illinois so as to be amenable to local process. A procedural question raised by the plaintiff will be subsequently referred to. *This being a diversity case, it can hardly be doubted but that the main question for decision is controlled by local law. Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524; *Pulson* v. *American Rolling Mill Co.*, 1 Cir., 170 F. 2d 193; *Kelley* v. *Delaware L. & W. R. Co.*, 1 Cir., 170 F. 2d 195." (Emphasis supplied)

The sole issue for this Court to determine is whether, on the undisputed facts in the instant case, the two federal courts below correctly construed and applied the Florida law with respect to the amenability of foreign corporations to suit in that State. Those courts were required to apply the standards and tests indicated by the Florida statute and Florida decisions, with an eye to the decisions of

this Court, only to avoid transcending the limitations imposed upon Florida by the due process clause of the United States Constitution as it has been interpreted by this Court. The situation, therefore, is exactly the same as if this were an appeal from a decision of the Supreme Court of Florida.

II

NEITHER THE DUE PROCESS CLAUSE NOR THIS COURT'S CLARIFICATION OF THE PERMISSIVE LIMITS OF DUE PROCESS COMPELS THE ASSERTION OF *IN PERSONAM* JURISDICTION IN THE INSTANT CASE.

Where the federal court in a diversity jurisdiction case, applying the law of the state of the forum, finds as a fact that the foreign corporation is not doing business in that state and is therefore not subject to *in personam* jurisdiction, no question of due process is presented. If, in the matter of subjecting foreign corporations to its jurisdiction, the law of the forum has not yet gone as far as this Court will now permit, it is for the Florida legislature and the Florida Supreme Court, and not for the federal courts, to consider whether the line should be kept in its present place or extended further. This principle was well stated in *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193 (1 Cir., 1948) at p. 195, where the Court said:

> "* * * It now develops from the Supreme Court's decision in *International Shoe Company* v. *State of Washington*, 1945, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057, that the constitutional limitations on jurisdiction over a foreign corporation are not as strict as they were once thought to be. The consequence of this discovery is that it might be possible to extend the Massachusetts statute

to some instances where the courts of that state have previously interpreted it to be inapplicable.

"Whether this be so or not we think it is no business for a federal court to meddle in. In this case we take the Massachusetts interpretation of a Massachusetts statute. It does not at all follow that the state court would give a different interpretation of the statute even though constitutional inhibitions upon doing so were removed. Courts frequently have several grounds upon which a conclusion may be based, although only one of them may be expressed. We think it is the business of the federal court to follow the state court's construction of its own statute, assuming, of course, that it does not transgress constitutional limitations, until the state court announces a different rule. We do so here. * * *"

Although the instant case was removed to the federal court, the Federal Rules of Civil Procedure (4 (d) (7)) made applicable the Florida statute (Fla. Stat. Ann., Sec. 47.17) setting forth the means by which a foreign corporation can be subjected to process in the courts of that State. This statute provides that absent certain supervisory officers or agents, "service may be made upon any agent *transacting business* for it in this state" (Emphasis supplied). Basically, therefore, the only issue is whether the respondent was actually doing business in Florida. If it was not, Briardy, on whom service was effected, could not have been "transacting business" for it in the State.

All this has nothing to do with due process or with the academic problem of whether it is fair and reasonable for a state to require foreign corporations, not transacting business in the jurisdiction, to nevertheless defend suits in

that forum. The legislature of Florida, in its wisdom, did not attempt to subject foreign corporations, who were not actually "transacting business" in Florida, to suits in that State. Had it attempted to provide for or exercise jurisdiction over foreign corporations such as the respondent, which have no commercial dealings and negligible contacts in the State but which have some minor employee occasionally present in Florida on duties which in some way benefit the corporation, some rather serious constitutional issues might well have been presented. But that is a different case and wholly irrelevant here. Suffice it to say, a contention "that federal due process compels the State to open its courts to such a case has no substance." (*Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437, 440).

The true relationship between the local law, as defined by the state of the forum, and the decisions of this Court in this type of case was rather pointedly and very clearly expressed by the Court of Appeals for the Fifth Circuit in *Rosenthal* v. *Frankfort Distillers Corp.*, 193 F. 2d 137, 141 (1951) [cited by that Court in its majority opinion in the instant case] as follows:

> "Appellant's insistence, that the later decisions[8] of the Supreme Court of the United States have made inapplicable the decisions cited and relied on by appellee, and the district judge, misconceives the primary question at issue. This is not, as appellant seems to think, what permissible reach, within the federal constitution, that court would, under the facts, give to a construction by the state court of the Texas Statutes governing the doing of business in

[8] *International Shoe Co.* v. *State*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95; *Travelers Health Ass'n* v. *Commonwealth*, 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154.

the state by, and the service of process upon, foreign corporations. It is what construction the Courts of Texas have actually given to the statutes.

"As was well said in *Pulson* v. *American Rolling Mill Co.*, 1 Cir., 170 F. 2d 193 at page 194: 'There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. Const. art. 1 § 8, cl. 3; Amend. 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation.' Cf. *Employers' Liability* v. *Lejeune*, 5 Cir., 189 F. 2d 521."

Petitioner, in urging before this Court that the courts below erred in failing to follow "the formula of this Court laid down in *International Shoe Company* v. *State of Washington*" (Petitioner's Brief, p. 3), indicates, we believe, a complete misunderstanding of just what was involved in that case. The issue presented in the *International Shoe* case was whether the determination by the Supreme Court of the State of Washington that the Shoe Company, a foreign corporation, was subject to service of process in the

State of Washington, in an action brought by the State to collect an unemployment compensation tax, violated the due process clause of the Constitution. The question was solely one of the *constitutional power* of the State of Washington to assert personal jurisdiction over the foreign corporation and the holding was that the determination by the highest court of the State of Washington that under the law of Washington the Shoe Company's activities within the state amounted to "doing business", did not violate any provision of the U. S. Constitution. In its opinion, this Court reviewed what the Supreme Court of Washington had held and sustained that holding as not violating the requirements of due process. As Mr. Justice Stone pointed out (326 U. S. at p. 314):

> "The Supreme Court of Washington was of opinion that the regular and systematic solicitation of orders in the state by appellant's salesmen, resulting in a continuous flow of appellant's product into the state, was sufficient to constitute doing business in the state so as to make appellant amenable to suit in its courts. But it was also of opinion that there were sufficient additional activities shown to bring the case within the rule frequently stated, that solicitation within a state by the agents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there."

The suggestion implicit in petitioner's position is that this Court in the *International Shoe* case automatically overruled all previous decisions in all courts with respect to what constitutes "doing business" and thereupon established some new, all-controlling federal test of "doing business".

Petitioner, in his specification of errors (Brief, p. 11), apparently argues that a federal court, in a diversity jurisdiction case, is bound to assert *in personam* jurisdiction if a finding of "doing business" on the facts presented would not be unconstitutional as violating due process. He would compel the federal court thus to take jurisdiction, even though the law of the state of the forum is in conflict with such a concept of "doing business" and requires a greater amount of activity on the part of a foreign corporation before the latter can be subjected to an *in personam* action. It is submitted that this Court has already rejected any such argument in *Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437 at p. 440 (1952), where it was pointed out:

> "The answer to the question of whether the state courts of Ohio are open to a proceeding *in personam*, against an amply notified foreign corporation, to enforce a cause of action not arising in Ohio and not related to the business or activities of the corporation in that State rests entirely upon the law of Ohio, unless the Due Process Clause of the Fourteenth Amendment compels a decision either way.
>
> "*The suggestion that federal due process compels the State to open its courts to such a case has no substance.* (Emphasis supplied.)
>
> "'Provisions for making foreign corporations subject to service in the State is a matter of legislative discretion, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State.' *Missouri, P. R. Co. v. Clarendon Co.*, 257 U. S. 533, 535."

There is, therefore, clearly no basis for any argument that the federal due process clause *requires a state to exercise in personam jurisdiction over a foreign corporation* where that state's legislature and its courts have not seen fit to either provide for, or assert, such jurisdiction in a given factual situation. Actually, due process *limits* a state in the exercise of *in personam* jurisdiction over a foreign corporation. As this Court, after pointing out that distinction, concluded in the *Perkins* case, *supra*:

> "* * * Consideration of the circumstances which, under the law of Ohio, ultimately will determine whether the courts of that State will choose to take jurisdiction over the corporation is reserved for the courts of that State." (p. 448)

Petitioner here, by construing the *International Shoe* case decision as determining how far a state *must* go in asserting jurisdiction, instead of how far a state *may* go, has misinterpreted the holding of that case and completely disregarded the opinion of this Court in the *Perkins* case.

III

THE COURTS BELOW CORRECTLY DECIDED THAT THE RESPONDENT WAS NOT "TRANSACTING BUSINESS" IN FLORIDA.

The record shows conclusively that the respondent's business is operated entirely outside the State of Florida. Not only does it have no property, office, place of business, directory listing, or representative stationed in Florida, but it neither solicits business, nor sells its product, nor collects money in that State (*supra*, pp. 5-13). Hence, it is

sheer fantasy to argue that the respondent is "transacting business" in Florida.

The only issue before this Court is whether, upon these undisputed facts, the respondent, a foreign corporation, must litigate in the courts in Florida the cause of action asserted against it. That is a question to be decided by the local law of the forum and is, in the instant case, a question primarily of statutory law. In deciding that respondent should not be forced to litigate in Florida this transitory cause of action, arising outside of that State, the two federal courts below necessarily construed and applied the Florida statute (Fla. Stat. Ann., Sec. 47.17) which provides that service of process on such a corporation "may be made upon any agent *transacting business* for it in this state." (Emphasis supplied.) No decision by the highest court of Florida has in any way expanded the normal meaning of the term "transacting business". With resort to nothing more than the plain meaning of the words of the controlling Florida statute, the holding of the two federal courts below that the respondent was not subject to *in personam* jurisdiction under the circumstances presented is unassailable.

An all-encompassing definition of what constitutes the doing of business by a foreign corporation is neither possible nor desirable. Reason and a regard for the realities dictate that each case be judged on its facts and viewed in the actual light of the commercial activities of the corporation in the forum as related to its entire operation. As a minimum, at the very least, there must be continuous and substantial prosecution of the essential business of the corporation within a state before it can be said that it is there "doing business" to an extent sufficient to justify a court in

accepting jurisdiction over it; it is not doing business within a state unless all its activities in the state form an integral part of its business, as distinguished from incidental operations.

The fact that the cause of action here is a transitory one, which did not even arise in the state of the forum, necessarily makes the instant case an even weaker one for asserting *in personam* jurisdiction. This is not a situation where the petitioner has been aggrieved by some tort committed in Florida by one of the two circulation roadmen employed by defendant. In the instant case, the alleged libel of the petitioner was in no way whatsoever connected with Briardy's activities in Florida. As appears above (*supra*, p. 7), no part of the respondent's editorial preparation of the magazine, wherein the claimed defamation appeared, occurred in that State. In fact, every activity of this foreign corporation having anything whatever to do with the production, publication, sale or distribution of the alleged libelous matter took place wholly outside of Florida (*supra*, pp. 7-11). Thus, even if the *injury* of which the petitioner complains occurred in part in Florida, it is manifest that the *cause of action* did not arise out of any activities of the respondent there. Although Look Magazine was circulated and sold within Florida by wholesalers to retail outlets and by such retailers to the public, *it was not sold or distributed there by the publisher-respondent*. This is not disputed and there is no claim that the wholesaler acted as an agent of respondent in the sale of its magazines in Florida. In fact, in the state court below, petitioner's service on the News Company "as agent" of the respondent was later quashed on *petitioner's own motion* (R. 14-15) after the facts had been fully developed

in depositions of The American News Company and of respondent.

It is apparent that Judge Russell, in his dissenting opinion below, has misinterpreted the record when he relied upon the sale and circulation of LOOK in Florida to justify his conclusion that respondent should be subjected to the jurisdiction of the court in Florida. Circulation and sale *by others* is obviously not a doing of business within the state of the forum by the respondent. If, as already pointed out, due process cannot compel a state to assert *in personam* jurisdiction *generally* over foreign corporations, *a fortiori*, due process, in its broadest interpretation, cannot require a state to make its *in personam* jurisdiction "over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State".

Perkins v. *Benguet Consolidated Mining Co.*, 342 U. S. 437 at p. 440;
Missouri, P. R. Co. v. *Clarendon Co.*, 257 U. S. 533, at p. 535.

No case in either the state or federal courts in Florida has sustained service upon a foreign corporation as "transacting business" there, unless the facts before the court showed, beyond question, that said foreign corporation was engaged in *both* (1) systematically and continuously employing local agents regularly stationed in the State as salesmen to solicit orders for the sale of its product, *plus* (2) some other activities carried on through such resident salesmen within the State.

The highest court of Florida applied the doing business test in *George A. Hormel & Co.* v. *Ackman*, 117 Fla. 419, 158 So. 171 (1934). The *Hormel* case, relied upon by peti-

tioner in the courts below and cited and referred to in the opinion of the Court of Appeals, presented the typical "solicitation plus" situation which both state and federal courts, in practically all cases, have held affords a basis for jurisdiction over the foreign corporation. In the *Hormel* case, the foreign corporation's employee, upon whom service was effected, solicited orders for the defendant's merchandise and collected monies due to the defendant in Florida. He was regularly stationed by the defendant in Florida and resided there. The merchandise shipped in fulfillment of such orders was delivered by defendant in Florida, by its own trucks. The Florida Supreme Court cited and adopted the reasoning of, *International Harvester Co.* v. *Commonwealth of Kentucky*, 234 U. S. 579 that continuous solicitation of orders through local agents of a foreign corporation, plus other activities in the state of the forum by such local agents, is sufficient upon which to base jurisdiction. In the instant case, the part-time and very limited activities of the two circulation roadmen, who from time to time go into Florida, do not even reach the level of "solicitation", much less "solicitation plus". Moreover, no local, resident employee is maintained by respondent in Florida for any purpose. The entire record in the case at bar fails to indicate the slightest evidence of any fixed, permanent or continuous representation of respondent in Florida either through an office or through an agent or employee regularly located there.

In determining the essentially factual issue as to whether the respondent was transacting business in Florida, the federal courts below quite properly, in the absence of factually similar Florida court cases, considered the decisions in cases in other circuits where libel suits, based upon causes of action

not arising in the forum, were sought to be maintained against foreign corporation publishers having minimal contacts in the state of the forum.

Significant is the decision in *Layne* v. *Tribune Co.*, 63 App. D. C. 213, 71 F. 2d 223 (1934), in which this Court denied certiorari, 293 U. S. 572. There the publisher of the Chicago Tribune, an Illinois corporation, was sued for libel in the District of Columbia. Service of process was made on the defendant's employee who had charge of the Washington office and of the gathering of news in Washington. Defendant moved to quash service and the Court of Appeals affirmed the decision of the lower court granting defendant's motion. Defendant maintained an office in Washington with four reporters and two telegraph operators operating a leased telegraph wire between its Washington and Chicago offices. The reporter's job was to collect Washington news and forward it to Chicago. All expenses and salaries of the Washington office were paid from Chicago. While the Washington office employees had no authority to make any contracts or collect any monies for the corporation, the head of the Washington office did have authority to purchase supplies and to employ additional telegraph operators. Nevertheless, the Court held that the corporation was not doing business in the District of Columbia, and was not subject to service of process there.

The decision of the U. S. Court of Appeals in *Whitaker* v. *MacFadden Publications, Inc.*, 105 F. 2d 44 (D. of C., 1939), gives ample support for the conclusion of the courts below that the limited duties performed by the respondent's two circulation roadmen, which are far less than those of the employees involved in the *Whitaker* case, do not amount to "transacting business" in Florida. In that case, the following facts appeared without dispute (p. 44):

> "Defendant is a New York corporation. It sells and ships its magazines to, and collects payment from, the District News Company, of Washington, D. C. The District News Company resells to and collects from retailers and street vendors. Pendergast and four assistants, for remuneration which defendant pays by check from New York, supervise and promote sales of the magazines among the street vendors who buy their stock from the District News Company. Pendergast solicits neither advertising nor subscriptions, and neither collects nor forwards money to defendant. Neither the District News Company nor Pendergast is authorized to make any contracts for defendant. Defendant has no place of business in the District, but the District News Company furnishes Pendergast with an office and telephone on its premises without cost to him or to defendant."

Upon these facts, the Court of Appeals affirmed an order granting the defendant's motion to quash service, holding that the defendant corporation was not doing business within the District in such manner and to such extent as to warrant the inference that it was present there.

Other libel cases cited in the opinion below (R. 113) are to the same effect:

> *Cannon* v. *Time, Inc.*, 115 F. 2d 423 (4 Cir., 1940);
>
> *Street & Smith Publications, Inc.* v. *Spikes*, 120 F. 2d 895 (5 Cir., 1941);
>
> *Neely* v. *Philadelphia Inquirer Co.*, 61 App. D. C. 334, 62 F. 2d 873 (1932).

Similarly, there was strong precedent in other decisions, involving the activities of travelling representatives, for

finding in the case at bar that performance of *some* services for it by a very minor employee of a foreign corporation does not entitle—much less compel—a court to assume personal jurisdiction over that corporation.

In *Echeverry v. Kellogg S. & S. Co.*, 175 F. 2d 900 (2 Cir., 1949), the foreign corporation, Kellogg Company, sold telephone and communications equipment manufactured by it to its wholly-owned subsidiary, Telephone Corporation, a New York corporation. This equipment, the latter corporation sold at retail to industrial users in a prescribed territory which included New York as well as portions of several other states. Kellogg Company also had an employee, Jones, regularly located in New York at the office of Telephone Corporation. The duties performed by Jones were described as follows:

> "His sole duty and authority as an employee of Kellogg Company is to periodically call upon certain designated customers of Kellogg Company located in the New York area and to discuss with them such problems as may arise from time to time in their use of equipment purchased from Kellogg Company. His efforts in this connection are designed to maintain customer good-will and satisfaction with the use of Kellogg Company products. His employment does not include the solicitation, nor does it authorize the acceptance, of orders from such customers for Kellogg Company."

and

> "* * * He has not, and never had, authority to accept orders for Kellogg Company in New York. His only duty as such employee of Kellogg Company in New York is, and always has been, to call on certain customers to get information from them with

respect to their present and prospective use of products made or sold by Kellogg Company, and to transmit that information to Kellogg Company in Chicago." (at p. 902)

The Court of Appeals on these facts held that the Kellogg Company was not doing business in New York.

In *DeSanta* v. *Nehi Corporation,* 171 F. 2d 696 (2 Cir., 1948), the defendant, a foreign corporation, sought to dismiss the complaint, in an action instituted in the state court but removed to the federal court, on the ground (1) that it was not doing business in New York, and (2) that Hughes, the person upon whom the summons had been served, was not its "managing agent", as required by the New York Civil Practice Act. Hughes, whose activities were relied upon as amounting to "transacting business" in New York, was a travelling representative of a foreign corporation whose job included inspection of local bottling plants and the making of suggestions to such plants to aid them in increasing their business. The Court of Appeals, affirming the lower court's dismissal, stated (pp. 698-699):

"Nehi Corporation is a Delaware corporation having its principal place of business in Georgia, where it manufactures concentrates to be used by purchasers to produce carbonated drinks. Its concentrates are sold to independent bottling plants located in the various states and these plants, using a formula furnished by Nehi Corporation, manufacture and bottle the soft drinks and sell them to retail stores. Nehi Corporation does business with several such independent bottling plants located in six cities in the state of New York. Orders for concentrates are sent by the bottling concerns to Nehi's place of business in Georgia where they are either accepted

> or rejected. Shipment of the goods is made from there and payment therefor is received there. Nehi has no office and no sales agents within the state of New York. It has a representative, Mr. Hughes, upon whom the summons and complaint were served, who visits the bottling plants at sporadic intervals. His territory includes all of New England as well as the state of New York. His duties are to inspect the bottling plants from the standpoint of sanitation, to obtain samples of their products and to forward such samples to Nehi in Georgia for analysis. He also makes suggestions as to advertising and business practices designed to aid the bottling plants in increasing their business, but such suggestions are not mandatory instructions. It is unnecessary, we think, to recite more of the facts as found by the court. We agree with its conclusion that the defendant does not transact business in the state of New York in a maner to subject it to suit here, and that Mr. Hughes was not the 'managing agent' of the defendant."

Certainly, the activities of Pendergast and his four assistants in the *Whitaker* case; of Hughes in the *DeSanta* case; and of Jones in the *Echeverry* case far exceeded those of the two non-resident minor employees of the respondent who from time to time travelled part of Florida. The restricted and limited activities of these two circulation roadmen have been fully described (*supra*, pp. 11-13). They solicited no orders for sales of respondent's magazines or of advertising in such magazines or of anything else. They collected no monies for respondent and could not commit the foreign corporation to anything. Neither of them was a resident of Florida or was assigned or stationed there as a permanent representative of defendant for any purpose. Their presence in Florida, which

amounted to no more than twenty per cent of their time, was in the course of their multi-state travel, during which their sole duties were to check on whether respondent's magazines were as well displayed as those of its competitors, and to receive and forward to the respondent in New York City their own or retailers' criticisms of displays and distribution (R. 46, 80-81). And, despite the contrary finding of the two courts below, the petitioner would have this Court believe that Briardy, one such minor employee, in a real sense represents the respondent in Florida!

All of the cases discussed above make it abundantly clear that where a foreign corporation has only such minor contacts in the forum, the courts will decline jurisdiction. No decision of this Court or of any state or federal court in Florida has even indicated the slightest support for petitioner's contention (Brief, pp. 21-22) that so long as transactions which might in any way benefit a foreign corporation take place in the state where service has been attempted, and so long as the person upon whom service has been made is employed by the foreign corporation, the court of the forum is not only permitted but compelled to assert jurisdiction. The decisions cited by the Court of Appeals in the opinion below, and discussed herein, conclusively rebut this contention.

IV

THE HOLDING OF THE COURTS BELOW IN NO WAY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT OR WITH DECISIONS IN THE OTHER CIRCUITS.

A. There is no conflict between the holding of the courts below and decisions of the other Circuits.

Petitioner argues (Brief, p. 14) that the holding of the courts below conflicts with decisions of the First, Second and Seventh Circuits. Actually, there is no such conflict.

The rule in the First Circuit is explained at length in *Pulson* v. *American Rolling Mill Co.*, 170 F. 2d 193, discussed, *supra*, at pp. 14-17. *Schmikler* v. *Petersime Incubator Co.*, 177 F. 2d 983 (1949), cited by petitioner as showing such conflict (Brief, p. 14), involved a clear application of the "solicitation plus" rule which prevails in Massachusetts, the state of the forum, and in no sense departed from the rule of the *Pulson* case. The *Pulson* case was specifically followed and relied upon by the Fifth Circuit in *Rosenthal* v. *Frankfort Distillers Corp.*, 193 F. 2d 137 (cited with approval by the Court of Appeals in its opinion below and discussed, *supra*, pp. 18-19).

The case cited by petitioner in the Seventh Circuit, *Consolidated Cosmetics* v. *D-A Pub. Co., Inc.*, 186 F. 2d 906 (1951) involved a federal question, infringement of plaintiff's registered trademarks "Tabu" and "Taboo" by defendant's magazine entitled "Taboo". The foreign corporation, as it is required to do for Second Class mailing privileges under the Postal Laws, "designated Mount Morris [Illinois] as the public office where its business is transacted during its usual business hours" (p. 907). The test to be applied in a diversity jurisdiction case was not therein discussed. Shortly after that decision, however, the same court did pass upon the question of "doing business" in a diversity jurisdiction case. In *Canvas Fabricators* v. *William E. Hooper & Sons Co.*, 199 F. 2d 485 (1952), that court applied the law of the forum and held that under the Illinois test of "doing business", there being no showing of "solicitation plus", the federal court was correct in declining jurisdiction over the foreign corporation (discussed, *supra*, p. 15).

Finally, petitioner says that the rule of the Second Circuit, as applied in *French* v. *Gibbs Corporation*, 189

F. 2d 787 (1951), is in conflict with the holding below in the case at bar. In the *French* case, the defendant corporation concededly had been doing business in the State of New York until a month prior to the service of process upon it. It had not wholly withdrawn from the state, and the claim in suit was an action for breach of a contract that had been made, performed and breached in the State of New York. Under these circumstances, the court held that the defendant was still subject to suit in New York. Not only is there no conflict between the decision of the Fifth Circuit in the instant case and the rule obtaining in the Second Circuit, but two cases in the Second Circuit, decided a few years after the *International Shoe* case, show accord rather than diversity on similar factual situations (*DeSanta* v. *Nehi Corp.*, 171 F. 2d 696; *Echeverry* v. *Kellogg S. & S. Co.*, 175 F. 2d 900, discussed, *supra*, pp. 29-31).

None of the cases cited by petitioner involved a situation which even remotely resembles the facts in the instant case, and the petitioner is, therefore, wholly unwarranted in urging that there is a conflict in decision between the judgment of the Court of Appeals in this case and any of these decisions in the First, Second and Seventh Circuits.

B. The holding below does not conflict with any decision of this Court.

Petitioner's contention that there is a conflict between this Court's decision in the *International Shoe* case and the decision of the Court of Appeals below is based entirely upon an erroneous premise. He suggests that if a federal court in a diversity jurisdiction case can, within the limits of federal due process, assert jurisdiction in a given case, it

is compelled to do so, irrespective of the law of the forum (Petitioner's Brief, pp. 11-12). As already pointed out (*supra*, pp. 16-22), this Court, in the *International Shoe* case, redefined the constitutional limits on how far a state *might go* in asserting jurisdiction over a foreign corporation; it indicated the irreducible minimum of activities in, or contacts with, the forum that must exist to satisfy the requirement of due process; it did not purport to tell the state how far it *must* or even should go. Any possible doubt on this score was removed by this Court in *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U. S. 437 at 440, 448.

But even if the courts below had looked to the *International Shoe* case, as an affirmative standard as to what is "doing business", it is submitted that the result would not have been different. In that case, it must be noted that: (1) the State was the plaintiff which sought to regulate only those activities of the foreign corporation carried on within that State's own boundaries; (2) resident agents permanently located in the State regularly solicited sales of products for the foreign corporation; (3) the foreign corporation's activities within the State, though mainly solicitation of sales of products through local resident agents, were not strictly limited to such solicitation; and (4) the cause of action arose directly out of the activities of the foreign corporation within the State and the relief sought was with respect to those activities only.

As we have already stressed earlier in this brief (*supra*, pp. 5-13, 24-25), in the case at bar there is (1) no resident employee of the respondent in Florida for any purpose (unlike the 11 resident salesmen in the *International* case); (2) no regular location or office of any kind of the respond-

ent in Florida (unlike the showrooms and merchandise displays in the *International* case); (3) no action brought to enforce an obligation arising out of the respondent's activities within Florida (unlike the *International* case where the State of Washington was suing to collect an unemployment compensation tax levied on the earnings only of those 11 salesmen regularly residing in, and employed full time by, the Shoe Company in Washington); and (4) no solicitation of orders for respondent's product on a regular, systematic, continuous or any other basis (unlike the *International* case where the 11 resident salesmen were engaged in the State of Washington full time, exhibiting merchandise and continuously soliciting orders for the same). In fact, in the instant case, there has been no solicitation of business whatever by any representative of the respondent in the state of the forum. It cannot be said, therefore, that the holding of the courts below is in any sense in conflict with this Court's decision in the *International Shoe* case for, as is perfectly apparent, the facts here presented are entirely different and there exists no issue as to whether the state of the forum has exceeded the constitutional limits imposed by the due process clause.

C. There is no issue presented by petitioner that warrants review by this Court.

This is not a case, as petitioner seems to imply, where the lower courts declined jurisdiction on the ground that it would have been a violation of due process to have asserted it. The situation is not like that presented by *State Tax Commission* v. *Van Cott*, 306 U. S. 511, where the Utah Supreme Court in its opinion had stated that it reached its decision because it thought it was controlled by constitu-

tional limitations imposed by this Court in a specific decision. The instant case is more nearly analogous to *Radio Station W. O. W.* v. *Johnson,* 326 U. S. 120, 129, where this Court held:

> "This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law."

Nowhere in the opinion of the Court of Appeals is there any indication that the result reached was dictated by federal constitutional restrictions. Rather, the entire tenor of its opinion, in the light of its own prior decisions which it specifically cited as more fully stating its views, clearly indicates that it applied the law of Florida to the question at issue and found as a fact that respondent's activities in, or contacts with, that State were insufficient to warrant invoking jurisdiction. There is, therefore, "no occasion to discuss how far recent decisions might allow a state to go in extending its jurisdiction in this field. The question of federal constitutional limitations is not here before us." (*Pulson* v. *American Rolling Mill Co.,* 170 F. 2d 193, 195).

CONCLUSION

The instant case involves no constitutional issue and no federal question. It involves no conflict in decisions between the Circuits or between the holding below and decisions of this Court. It simply represents an unreasonable determination on the part of petitioner to try his case in a jurisdiction of his own choosing, despite the fact that

respondent's minimal contacts in Florida impelled both federal courts below to conclude as a fact that, under the law of Florida, respondent is not "transacting business" in that State.

If jurisdiction over such absent foreign corporations were to be extended as petitioner contends, then practically every manufacturer in this country of any nationally sold products (whether magazines or other merchandise) would be subject to suit in each and every one of the forty-eight states. Surely, no legislature and no court could ever have intended such a result or that tenuous a construction of "transacting business".

THE JUDGMENT OF THE COURT OF APPEALS WAS CORRECT AND SHOULD BE AFFIRMED.

Respectfully submitted,

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